



**In the Supreme Court of the
United States**

October Term, 1977

No. 77-44

BARNES & TUCKER COMPANY,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

*On Appeal From the Supreme Court of Pennsyl-
vania, Middle District.*

MOTION TO DISMISS OR AFFIRM

K. W. JAMES ROCHOW
Assistant Attorney General
Counsel for Appellee,
Commonwealth of Penn-
sylvania

P. O. Box 2357
505 Executive House
Harrisburg, Pennsylvania 17120

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 16840

TABLE OF CONTENTS

	PAGE
Motion To Dismiss or Affirm	1
Counter-Statement of Jurisdiction	2
Counter-Statement of Question Presented	3
Counter-Statement of the Case	4
Argument:	
I. Pennsylvania's Requirement That an Operator Abate Its Post-Mining Discharge of Acid Mine Drainage in Order To Protect Pennsylvania's Industry and Public From the Worst Source of Water Pollution in the State Is a Valid Exercise of Pennsylvania's Police Power	6
A. Pennsylvania has a compelling interest in the abatement of discharges of acid mine drainage—especially post-mining discharges from deep mines—because they constitute Pennsylvania's worst water pollution problem	6
B. Barnes & Tucker's failure to introduce evidence showing the impact upon it of Pennsylvania's requirement that operators abate their post-mining discharges precludes Barnes & Tucker from prevailing on the merits	9
C. The fact that acid mine drainage discharges in Pennsylvania have been at all times subject to abatement as common law public nuisances precludes Barnes & Tucker from prevailing on the merits	13

D. The abatement of post-mining polluting discharges by definition always involves imposing obligations on currently inactive operations	14
Conclusion	16

TABLE OF CITATIONS

CASES:

Commonwealth v. Barnes & Tucker Co., 9 Pa. Commonwealth Ct. 1, 303 A.2d 551 (1973)	4
Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974)	2, 4, 5, 7, 13, 15
Commonwealth v. Barnes & Tucker Co., 23 Pa. Commonwealth Ct. 496, 353 A.2d 471 (1976)	4, 9, 10, 11, 12
Commonwealth v. Barnes & Tucker Co., Pa. , 371 A.2d 461 (1977)	4, 5, 7, 8, 9, 10, 11, 12, 16
Commonwealth v. Harmar and Pittsburgh Coal Companies, 452 Pa. 77, 306 A.2d 308 (1973) (appeals dismissed for want of substantial federal questions, 415 U.S. 903)	7, 16
Goldblatt v. Hempstead, 369 U.S. 590	10, 11
Mugler v. Kansas, 123 U.S. 623	11
North Dakota Pharmacy B'd. v. Snyder's Stores, 414 U.S. 156	9

OTHER AUTHORITIES:

Appalachian Regional Commission's Report, Acid Mine Drainage in Appalachia, H.R. Doc. 91-180 (91st Cong., 1st Sess. 1969)	7
---	---

Bosselman et al., The Taking Issue (1973), esp. 197-199	11
Pennsylvania Constitution, Art. I, Sec. 27	7

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1977
No. 77-44

BARNES & TUCKER COMPANY,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

*On Appeal From The Supreme Court Of Pennsylvania,
Middle District*

MOTION TO DISMISS OR AFFIRM

The Commonwealth of Pennsylvania, Appellee moves the Court to dismiss the instant Appeal or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania without further argument on the ground that the instant Appeal presents no substantial federal questions.

COUNTER-STATEMENT OF JURISDICTION

The Jurisdictional Statement of Barnes and Tucker Company ("Barnes & Tucker"), Appellant, fails to indicate that one of the independent bases of Barnes & Tucker's liability to abate the polluting discharge from its Mine No. 15 is common law public nuisance (*Commonwealth v. Barnes & Tucker*, 455 Pa. 392, 408, 319 A.2d 871, 880 (1974); A. 85).¹

As the Pennsylvania Supreme Court found, the discharge of acid mine drainage into Pennsylvania's waters has constituted a public nuisance under Pennsylvania common law at all times (455 Pa. at 417, 319 A.2d at 884; A. 94).

¹ References to "A" page numbers are to the Appendix to Barnes & Tucker's Jurisdictional Statement. In the interest of succinctness, citations to the opinions in this case below will be by volume and page only.

COUNTER-STATEMENT OF QUESTION PRESENTED

Do not Pennsylvania's common law and statutory law declarations that the post-mining discharge of acid mine drainage is a public nuisance which must be abated by the operator who caused it constitute a valid exercise of the police power necessary to protect Pennsylvania's public and industry from Pennsylvania's worst water pollution problem?

COUNTER-STATEMENT OF THE CASE

Among the facts which Barnes & Tucker fails to include in its Statement of the Case are the following:

1. Despite the repeated opportunities afforded by the Pennsylvania courts to do so, Barnes & Tucker failed to introduce any evidence whatsoever regarding the economic impact upon it of the requirement that it abate the polluting discharge from its Mine No. 15 into the West Branch of the Susquehanna River (23 Pa. Commonwealth Ct. 496, at 511-512, 353 A.2d at 480; A. 113-114; 371 A.2d at 468; A. 129-130).

2. One of the independent bases of Barnes & Tucker's liability in this case is common law public nuisance (455 Pa. at 408, 319 A.2d at 880; A. 85).

3. The discharge of acid mine drainage has constituted a public nuisance under Pennsylvania common law at all times (455 Pa. at 417, 319 A.2d at 884; A. 94).

4. Barnes & Tucker's conduct in its mining activity caused the polluting discharge from its Mine No. 15 (23 Pa. Commonwealth Ct. at 510, 353 A.2d at 479; A. 111; 371 A.2d at 466-467; A. 127).

5. The discharge from Mine No. 15 first occurred from a borehole which Barnes & Tucker never sealed, despite the fact that Barnes & Tucker represented under oath to the Commonwealth that it would seal all such openings with concrete to prevent post-mining discharges (9 Pa. Commonwealth Ct. 1, at 15, 303 A.2d at 551; A. 22-23, 26-27).

6. Since 1960, Barnes & Tucker's active mining permits did not allow any discharge of acid mine drainage—untreated or treated—into the West Branch of the Susquehanna River (455 Pa. at 415, 319 A.2d at 883-884; A. 92).

7. Barnes & Tucker failed to present any evidence concerning alternative methods of abating its discharge from Mine No. 15 (371 A.2d 461, at 468; A. 129-130). Moreover, Barnes & Tucker at no time in this case challenged the appropriateness of the relief—the Duman Dam facility—to abate the discharge from its Mine No. 15. To the contrary, Barnes & Tucker itself chose the Duman Dam facility as the most appropriate means of abating the polluting discharge from Mine No. 15, constructed it according to the terms of a stipulation it entered into with the Commonwealth and continues to operate it (371 A.2d at 464; A. 121-122).

8. Both decisions of the Pennsylvania Supreme Court ("Pa. Supreme Court") in this case were without dissent.²

² Mr. Justice Manderino did not participate in either decision.

ARGUMENT

I. PENNSYLVANIA'S REQUIREMENT THAT AN OPERATOR ABATE ITS POST-MINING DISCHARGE OF ACID MINE DRAINAGE IN ORDER TO PROTECT PENNSYLVANIA'S INDUSTRY AND PUBLIC FROM THE WORST SOURCE OF WATER POLLUTION IN THE STATE IS A VALID EXERCISE OF PENNSYLVANIA'S POLICE POWER

A. Pennsylvania Has a Compelling Interest in the Abatement of Discharges of Acid Mine Drainage—Especially Post-Mining Discharges From Deep Mines—Because They Constitute Pennsylvania's Worst Water Pollution Problem

The discharge of acid mine drainage³ into Pennsylvania's waters constitutes Pennsylvania's worst water pollu-

³ "Acid mine drainage is primarily the result of acid and iron pollutants formed when the pyrite and marcasite (iron disulfides) present in coalbeds are exposed to the atmosphere and water. When coal is extracted, the pyrites in the mine are exposed to air and water. A chemical reaction occurs and the pyrite is oxidized to form ferrous sulfate and sulfuric acid. The ferrous sulfate and sulfuric acid thus formed are washed off the coal mine walls into the ground water flowing through the mine, where further hydrolizing or oxidizing occurs and ferric iron and additional acids are formed. The ferrous sulfate is then hydrolized forming ferrous iron. Next the ferrous iron is oxidized to the ferric state and additional acidity results.

tion problem. *Commonwealth v. Harmar and Pittsburgh Coal Companies*, 452 Pa. 77, 84, 306 A.2d 308, 312-313 (1973) (*appeals dismissed* for want of substantial federal questions, 415 U.S. 903); *Commonwealth v. Barnes & Tucker*, 455 Pa. 392, 412-413, 319 A.2d 871, 882 (1974); A. 89-90; *Commonwealth v. Barnes & Tucker*, Pa. , 371 A.2d 461, 465-466 (1977); A. 125-126; see Appalachian Regional Commission's Report, *Acid Mine Drainage in Appalachia*, H.R. Doc. 91-180 (91st Cong., 1st Sess. 1969).⁴

Indeed, Pennsylvania has the severest acid mine drainage pollution problem in the entire country and has almost 2,500 miles of streams polluted by acid mine drainage. *Id.* Moreover, Pennsylvania's coal has the highest pollution potential of any coal in the world.

Among the damage which acid mine drainage causes in Pennsylvania is destruction of the assimilative waste

"The end result is that the receiving streams are loaded with sulfates, acid and iron hydroxides, as well as such dissolved minerals as aluminum, calcium, magnesium, manganese and ferrous iron. . . .

" 'Acid drainage affects the surrounding environment by reducing the pH of both soil and streams to an extent that it is not conducive to most vegetable growth. For example, if the pH of a stream is reduced below 5.0, the stream is incapable of supporting fish. This type of pollution is responsible for a major share of the economic damage resulting from coal mine water pollution.' [citation omitted]" *Commonwealth v. Barnes & Tucker*, — Pa. —, 371 A.2d 461, 465-466, n. 9 (1977); A. 125.

⁴ Even Pennsylvania's Constitution—Art. I, §27—declares a public interest in the abatement of acid mine drainage. See *Harmar*, 452 Pa. at 93-94, 306 A.2d at 317; 455 Pa. at 412-413, 319 A.2d at 882; A. 90.

capacity of streams; destruction of aquatic plants and animals; damage to navigation—including boats, barges and dams; erosion of the concrete in bridge abutments and metal culverts; and destruction of sources of water for the public and industry. *Id.*

The cost to Pennsylvania's public and industry of acid mine drainage pollution is astronomically high and includes the cost of industrial and municipal water treatment. *Id.*

The worst source of acid mine drainage pollution in Pennsylvania is the very type of source involved in this case—post-mining discharges from deep mines. As the Pennsylvania Supreme Court noted:

“‘Underground mines produce 71.3% of all mine acid drainage, although they constitute only 58% of the number of individual sources. Inactive underground mines, constituting 53% of the sources, contribute 52.5% of the total acid mine drainage. Active underground mines on the other hand, contribute 18.8% of total acid mine drainage, although they constitute only 5% of the total sources. Thus not only is the acid mine drainage problem concentrated geographically, it is also concentrated in one segment of the mining industry.’ [citations omitted] . . . One study has estimated that approximately seventy-eight percent of all acid mine drainage in Appalachia has been estimated to flow from abandoned or inactive mines. Comment, Environmental Law—Acid Mine Drainage, 76 W. Va. L. Rev. 508, 520 (1973-74), citing Bituminous Coal Research, Inc., Studies on Limestone Treatment.” 371 A.2d at 466 n. 10; A. 125-126.

B. Barnes & Tucker's Failure To Introduce Evidence Showing the Impact Upon It of Pennsylvania's Requirement That Operators Abate Their Post-Mining Discharges Precludes Barnes & Tucker From Prevailing on the Merits

It is well-settled that the strongest possible presumption stands in favor of the validity of police power regulation and that the burden of proof consequently is very heavy upon those who would challenge such regulation. *E.g., North Dakota Pharmacy B'd. v. Snyder's Stores*, 414 U.S. 156, 164-167.

Barnes & Tucker, despite being afforded repeated opportunities to do so by the Pennsylvania courts, completely failed to present any evidence to meet its very heavy burden of proof in support of its claims of unconstitutionality. Most notably, Barnes & Tucker failed to introduce any evidence concerning the economic impact upon it (much less the conglomerate of which it is a part) of the requirement that it abate the polluting discharge of acid mine drainage from its Mine No. 15. 23 Pa. Commonwealth Ct. at 511-512, 353 A.2d at 480; A. 113-114; 371 A.2d at 468; A. 129-130. Barnes & Tucker also failed to introduce any evidence concerning alternative methods of abatement. 371 A.2d at 468; A. 129-130.

Based on Barnes & Tucker's complete failure to adduce evidence in support of its contention that it was unconstitutional for Pennsylvania to require it to abate its Mine No. 15 discharge, the chancellor made the following finding, which the Pa. Supreme Court affirmed:

"In this case, however, we have no way of measuring such economic impact. Although afforded an opportunity on remand to introduce such additional evidence as it deemed relevant to the issues on remand, Barnes & Tucker did not see fit to introduce any new evidence into the case. We are thus without knowledge of its capital structure, assets and liabilities or its profits or losses, if any.

"We know only the monthly costs, now accumulated over several years, of operating the Duman Dam facility to pump and treat the mine water accumulating in Mine No. 15, which has been closed and remains closed to this date. On such a record Barnes & Tucker would have us declare that the costs of operating the Duman Dam facility at its expense as the only presently known method of abating the nuisance in question is the equivalent of a taking of its property or as beyond the parameters of reason, thereby effectively isolating this cost from the relative economic impact thereof upon its corporate assets and profits. No precedent is cited for such a convenient insulation of corporate assets from its responsibility and attendant costs of abating this public nuisance, and we will not establish one here by concluding that the cost of treating the mine drainage is per se beyond the parameters of reason or the equivalent of a taking of its property" 23 Pa. Commonwealth Ct. at 511-512, 353 A.2d at 480; A. 113-114; *affirmed*, 371 A.2d at 468; A. 129-130.

Accord, *Goldblatt v. Hempstead*, 369 U.S. 590 (Zoning ordinance upheld as constitutional because of a "dearth of relevant evidence" concerning such things as "the availability and effectiveness of other less drastic protective

steps, and the loss which appellants will suffer from the imposition of the ordinance.")^{5,6}

Barnes & Tucker's failure to adduce any evidence to sustain its claim of unconstitutionality is especially fatal to its case in light of Pennsylvania's compelling interest in preventing the destruction of its waterways from acid mine drainage (see §A, *supra*) and in preventing the major threat to Pennsylvania's waters specifically posed by the polluting discharge from Mine No. 15.

As the chancellor found and the Pa. Supreme Court affirmed:

" . . . As measured against the deleterious impact of the untreated mine water entering the waters of the Commonwealth upon the health, safety and welfare of the citizens of the Commonwealth, not to mention the less obvious impact upon the environment

⁵ In contrast to the instant case—which involves the clearest possible public interest in the abatement of a highly polluting nuisance—*Goldblatt* involved an at best marginal public interest—an exercise of the zoning powers to prohibit the continuation of a long-established, non-polluting business enterprise. The court, nevertheless, emphasized in *Goldblatt* that, at the minimum, specific, detailed and persuasive evidence had to be adduced to support a claim of unconstitutionality of police power regulation.

⁶ Barnes & Tucker's failure to adduce evidence to support its claim makes any further discussion of the relationship between the police power and eminent domain unnecessary. We note, however, that the instant case has none of the attributes of eminent domain—for example, the appropriation of property by the state. Rather, the instant case involves the requirement that a public nuisance under both common law and statutory law be abated. See generally *Mugler v. Kansas*, 123 U.S. 623; *Bosselman, et al., The Taking Issue* (1973), esp. 197-199.

in general, Barnes & Tucker falls far short of the burden required of it to preclude entry of an abatement order on constitutional grounds."^{7, 8} 23 Pa. Commonwealth Ct. at 512, 353 A.2d at 480; A. 114; *affirmed*, 371 A.2d at 468; A. 129-130.

⁷ Barnes & Tucker has never challenged the appropriateness of the Duman Dam facility as the relief in this case. Indeed, Barnes & Tucker itself agreed to construct and operate the Duman Dam facility as part of a stipulation it entered into with the Commonwealth and continues to operate it. 371 A.2d at 464; A. 121-122.

⁸ As part of its attempt to substitute rhetoric for specific and persuasive evidence, Barnes & Tucker states that the treatment of its discharge will be "perpetual". To the contrary, the court below found in accord with scientific principles that the mine will cleanse itself (i.e., the acid producing material will leach out) over time. 23 Pa. Commonwealth Ct. at 508, 353 A.2d at 478; A. 110. In any event, the court below pointed out that "... the chancellor, in fashioning the abatement relief, has before him no alternatives and must order abatement by . . . [the Duman Dam facility], subject, of course, to future modification of the abatement order upon proper proof and showing of feasibility of an alternative course of action." 23 Pa. Commonwealth Ct. at 502, 353 A.2d at 475; A. 103.

C. The Fact That Acid Mine Drainage Discharges in Pennsylvania Have Been at All Times Subject to Abatement as Common Law Public Nuisances Precludes Barnes & Tucker From Prevailing on the Merits

As part of Barnes & Tucker's unsupported scatter-shot allegations that it is unconstitutional to require it to treat the discharge from its Mine No. 15, Barnes & Tucker claims that such a requirement is unconstitutionally retroactive.

Barnes & Tucker's claim is stillborn since one of the independent bases of Barnes & Tucker's liability in this case is common law public nuisance. 455 Pa. at 408, 319 A.2d at 880; A. 85. As the Pa. Supreme Court dispositively stated, discharges of acid mine drainage have been a common law public nuisance in Pennsylvania at all times.⁹ 455 Pa. at 417; 319 A.2d at 884; A. 94. Because liability for such discharges has at all times existed under Pennsylvania common law, there is no question of retroactivity in this case.

As the Pa. Supreme Court also found, the relief requested and granted in this case was, in any event, directed towards preventing the reoccurrence of a public nuisance and was thus prospective, not retrospective in nature. 455 Pa. at 408, 417-418, 319 A.2d at 880, 884-885; A. 86, 94-95.

⁹ In any event, as the Pa. Supreme Court also dispositively stated, under well-established principles of Pennsylvania law "... stream polluters can acquire no prescriptive or property right to pollute as against the Commonwealth . . . [citations omitted]." 455 Pa. at 415, 319 A.2d at 884; A. 92-93.

D. The Abatement of Post-Mining Polluting Discharges by Definition Always Involves Imposing Obligations on Currently Inactive Operations

Barnes & Tucker in its Jurisdictional Statement (e.g., at 27) places great emphasis, as it did below, on the argument that Pennsylvania's requirement that Barnes & Tucker abate the polluting discharge from its Mine No. 15 represents an unconstitutional "taking" because the property is not currently economically productive and the regulation results in a so-called "negative worth" upon the property. This argument ignores the nature of mining or, more precisely, is cynically designed to take advantage of it and would confer upon coal mining and similar operations a constitutional right to pollute to the extreme detriment of Pennsylvania's public and industry.

By definition, coal mining involves the extraction of a non-renewable resource. Generally speaking, the more one extinguishes (or destroys) the resource, the more profit one makes. At the same time, by far the greatest pollution hazard from underground coal mines in Pennsylvania is the pollution which occurs after mining and all mining operations have ceased and water accumulates in the mine to its maximum extent. Thus it is apparent that Barnes & Tucker's argument concerning the lack of current economic value to Barnes & Tucker of Mine No. 15 represents no more than a circular, self-serving "take the money and run" theory specifically tailored to serve Pennsylvania's coal operator to the detriment of Pennsylvania's public interest. The operator "destroys" the resource and in so doing makes a profit. Then when the serious public nuisance of post-mining pollution results from its operation,

the operator claims it is exculpated from abating the nuisance because the operation is completed and is not currently economically productive.

Specifically, the "take the money and run" theory which Barnes & Tucker advocates would elevate to a constitutional principle the pollution of additional thousands of miles of streams in Pennsylvania. As the Pa. Supreme Court stated in its opinion in this case, "... [t]he Act [the Clean Streams Law] does not grant any preferred status to mine owners and operators in the discharge of pollutants into Pennsylvania waters." 455 Pa. at 413, 319 A.2d at 883; A. 91.

Indeed, not only coal mining, but other common activities in Pennsylvania combine the potential for extremely deleterious polluting discharges with the phenomenon that their most harmful discharges come after the operation is completed. Coal refuse piles and solid waste disposal areas (with their post-operational leachate discharges) are two examples of such activities. Post-operational polluting discharges from these activities are among the most serious pollution problems in Pennsylvania. These serious post-operational discharges occur, by definition, at a time when the operations are not economically productive. It would thus be a fatal blow to water pollution control in Pennsylvania if the absurd position were accepted that it is unconstitutional to require the treatment or abatement of discharges resulting from operations which are no longer economically productive.¹⁰

¹⁰ Barnes & Tucker also throws into its Jurisdictional Statement the argument that because some of the drainage which discharges into the waters of Pennsylvania from its Mine No. 15 flows through other mines into Mine No. 15, it should be exculpated from abating its discharge.

CONCLUSION

For the foregoing reasons, Appellee moves that this Appeal be dismissed or, in the alternative, that the Opinion of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,

K. W. JAMES ROCHOW

Assistant Attorney General

Counsel for Appellee, Commonwealth of Pennsylvania

In the first place, this issue has already been settled. As the Pa. Supreme Court noted in *Barnes & Tucker II*, the consolidated cases of *Harmar and Pittsburgh Coal Companies* dispositively held that "mine drainage does not cease to be mine drainage once mining has ceased in the mine from which it continues to drain" and that the nuisance to be remedied is the *discharge* into Pennsylvania's waters from the mine (in this case, Mine No. 15). 371 A.2d at 466; A. 126-127. The Court dismissed the coal companies' appeals from that decision because they presented no substantial federal questions. 415 U.S. at 903.

Barnes & Tucker's specious "sources of water" argument must in any event fail because, as the chancellor found and the Pa. Supreme Court affirmed, it was Barnes & Tucker's conduct in its mining activity which caused the discharge to occur. 371 A.2d at 466-467; A. 127.